

Date of Decision: 13th July 1995

SPECIAL CIVIL APPLICATION NO. 4970 of 1987

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Shri H.M. Parikh, Advocate, for the Petitioner

Shri B.K. Parikh, Advocate, for Shri M.C. Shah, Advocate, for Respondent No. 1

Shri K.C. Shah, Asst. Government Pleader, for Respondent No.2

CORAM: A.N. DIVECHA, J.
(13th July 1995)

ORAL JUDGMENT

The judgment and the order passed by the learned 2nd Joint District Judge of Kheda at Nadiad on 29th August 1987 in Civil Miscellaneous Appeal No. 95 of 1986 is under

challenge in this petition under Articles 226 and 227 of the Constitution of India. By his impugned order, the learned lower appellate Judge accepted the appeal filed by and on behalf of the Nadiad Nagarpalika (respondent No.1 herein) and set aside the order passed by the learned Civil Judge (S.D.) at Nadiad below the application at Exh. 5 in Regular Civil Suit No. 32 of 1986. By his aforesaid order, the learned Trial Judge had directed the parties to maintain status quo by not compelling members of the petitioner herein for removal of their lorries on public streets.

2. It is not necessary to set out in detail the facts giving rise to this petition. It may be sufficient to note that the petitioner is a co-operative society having its members as lorriwalas. These members of the petitioner-society were keeping their lorries in stationary position on public streets. It appears that their stationary lorries on public streets obstructed the pedestrian and the vehicular traffic thereon. Thereupon respondent No.1 wanted to remove them from public streets. The petitioner therefore filed one suit in the court of the Civil Judge (S.D.) at Nadiad inter alia for a permanent injunction restraining respondent No.1 herein from compelling members of the petitioner to remove their lorries in question. It came to be registered as Civil Suit No. 32 of 1986. The petitioner herein made an application for an interim relief in the nature of the relief of permanent injunction claimed by it in the suit. It was taken on record as Exh. 5. After hearing the parties, by his order passed on 31st March 1986 therebelow, the learned Trial Judge granted to the petitioner the desired interim relief. Its copy together with the application for interim relief is at Annexure E to this petition. That aggrieved respondent No.1 herein. It therefore carried the matter in appeal before the District Court of Kheda at Nadiad. Its appeal came to be registered as Civil Miscellaneous Appeal No. 95 of 1986. It appears to have been assigned to the learned 2nd Joint District Judge. After hearing the parties, by his judgment and order passed on 29th August 1987 in the aforesaid appeal, the lower Appellate Court was pleased to accept the appeal and to set aside the order passed by the learned Trial Judge at Annexure E to this petition. A copy of the judgment and the order passed in appeal as aforesaid is at Annexure F to this petition. The aggrieved petitioner has thereupon invoked the extra-ordinary jurisdiction of this court by means of this petition under Articles 226 and 227 of the Constitution of India for questioning the correctness of the judgment and the order at Annexure F to this petition.

3. Shri Parikh for the petitioner has invited my attention to two communications of 13th February 1985 and 18th February

1985 addressed to the petitioner and the Collector of Kheda respectively and submitted that respondent No.1 as way back in 1985 proposed creation of a shopping centre for small shopkeepers, and yet nothing concrete has been done by or on behalf of respondent No.1 so far. Copies of these communications are at Annexures A and B respectively to this petition.

4. It cannot be gainsaid that it would be a duty of respondent No.1 municipality to create a market. Dereliction of duty on the part of respondent No.1 does not entitle the petitioner or its members to encroach upon public streets for carrying on their business however small in magnitude or nature.

5. I am fortified in my view by the binding Division Bench ruling of this court in the case of Gulamali Gulamnabi Shaikh v. The Municipal Commissioner and Ors. reported in 1986 G.L.H. 616. In that case also public streets of Ahmedabad within the municipal areas were encroached for carrying on small business and they moved this court against their removal from public streets. This very contention was urged before this court that an obligation was cast on the Municipal Corporation of Ahmedabad to construct and to maintain markets. In that context, this court has held that casting of such obligations on the municipal corporation does not confer any rights on hawkers to carry on business on public streets. Sitting as a single Judge I am indeed bound by the aforesaid Division Bench ruling of this court. Even otherwise, I am in respectful agreement therewith. The aforesaid Division Bench ruling of this court is on all fours applicable in the present case. What applies to public streets within municipal areas of Ahmedabad would be applicable to municipal areas of any other city.

6. Shri Parikh for the petitioner has made a grievance that no principles of natural justice were observed before ordering removal of members of the petitioner from the places they occupied for carrying on their business. This submission has to be stated only to be rejected in view of the aforesaid Division Bench ruling of this court in the case of Gulamali Gulamnabi Shaikh (supra). The very same contention pressing into service principles of natural justice in that case was rejected by this court.

7. It may be noted that the aforesaid Division Bench ruling of this court has been followed by another Division Bench of this court in its unreported ruling in Special Civil Application No. 3719 of 1982 decided on 5th August 1994.

8. The ruling of this court in the case of Nehru Marg Cabin

Association v. Modasa Nagar Palika and Ors. reported in 1988(1) G.L.H. 289 will not come to the rescue of the petitioner in this case for the simple reason that it runs counter to the aforesaid Division Bench ruling of this court in the case of Gulamali Gulamnabi Shaikh (supra). The aforesaid ruling of this court in the case of Nehru Marg Cabin Association (supra) has been rendered by a learned single Judge of this court. It is a settled principle of law that in the case of a conflict between two rulings of the same court, the decision rendered by the larger Bench has to be followed. Besides, the aforesaid ruling of the learned single in the case of Nehru Marg Cabin Association (supra) has not taken note of the aforesaid Division Bench ruling of this court in the case of Gulamali Gulamnabi Shaikh (supra). In that view of the matter, the learned Civil Judge's ruling in the case of Nehru Marg Cabin Association (supra) can be said to be per incuriam. It is a settled principle of law that a judgment per incuriam has no binding efficacy.

9. Shri Parikh for the petition has then urged that the interim relief granted by this court remained in operation for last about 8 years and the same interim relief may be continued and the trial Court may be directed to expedite the hearing of the suit. I am unable to countenance this submission for the simple reason that members of the petitioner are carrying on their business on public streets and the aforesaid Division Bench ruling of this court in the case of Gulamali Gulamnabi Shaikh (supra) would not permit them to do so.

10. In view of my aforesaid discussion, I am of the opinion that the judgment and the order at Annexure F to this petition under challenge in this petition calls for no interference by this court in this petition under Articles 226 and 227 of the Constitution of India. This petition therefore deserves to be rejected.

11. In the result, this petition fails. It is hereby rejected. Rule is accordingly discharged with no order as to costs. The interim relief stands vacated.
